causes of action, at this time [Rie] does not appeal from Ruling as far as [the Bank] does not cross-appeal."

C. Post-Appeal Dismissal of Action Against Bank

The court's August 1, 2003, order gave Rie 20 days (until August 21, 2003) to amend his complaint. Rie did not file an amended complaint. On October 7, 2003, the court dismissed the action against the Bank based on its sustaining of the Bank's demurrer to the FAC, and Rie's failure to file a second amended complaint.

In September 2004, Rie sought relief from the dismissal under Code of Civil Procedure section 473, claiming that he had been misled by opposing counsel as to the nature of the hearing on October 7. Rie stated in his moving papers before the trial court that he "was under the impression that the appellate case created a stay as to the trial court proceedings." He gave the same excuse for his failure to move for section 473 relief sooner.

## VI. PROCEDURAL HISTORY

This case was initially brought before Honorable Gregory Alarcon in the Los Angeles County Superior Court. That court entered judgment on August 1, 2003. Appellant timely filed a motion to appeal with the Second District Court of Appeals. That case was briefed and later argued and submitted on October 22, 2004.

The appeal concerned whether Plaintiff has, or can properly state a claim against defendants for interference with economic relations and interference with prospective economic advantage between Appellant and defendant Bank of America. Appellant believes he has already plead facts sufficient to demonstrate both viable causes of action.

Respondent BOA sought a demurrer as to all of the appellant's causes of action. The trial court granted Mr. Rie leave to amend four (4) of his causes of action and sustained the demurrer without leave to amend as to nine (9) of his causes of action. This substantially derailed Mr. Rie's case because many

of his claims were interdependent. With no practical alternative, Mr. Rie appealed that ruling - believing that CCP § 916-923 created an automatic stay to the lower court proceedings.

On October 7, 2003 an ex parte hearing was held and Plaintiff's two remaining and un-amended causes of action were dismissed. Rie was unable to attend the October 7, 2003 hearing for this case and his absence played a large role in the ruling. Rie had three hearings scheduled for the morning of October 7, 2003: one in Pasadena courthouse regarding case #GC028902, one in the downtown Los Angeles courthouse regarding case #03K09142, and the ex parte hearing for this case. Rie contacted the opposing party's attorney for each case to alter them of this scheduling conflict. The opposing counsel for case #03K09142 did not object to a continuance and one was filed and granted in late September of 2003. The opposing counsel for case #GC028902 objected to and refused to stipulate any continuances.

Mr. Todd Beebe, opposing counsel in this case, called Rie early in October of 2003, and during the conversation Rie informed him of the scheduling conflict. Mr. Beebe told Rie that he did not have to show up to the October 7th hearing. His tone and demeanor suggested to Rie that the hearing was unimportant. In partial reliance on this information, Rie went to the Pasadena courthouse for the hearing for case #GC028902. Rie was not at the hearing for this case and he did not have an opportunity to speak with the Judge or get a clear understanding of the proceedings and the final impact they had on his case.

The Appellate Court ruled to uphold the order sustaining the demurrers without leave to amend. That ruling gave rise to the appeal to the Supreme Court of California. On March 30, 2005, The Supreme Court of California denied the petition for review.

## VII. SUMMARY OF THE ARGUMENT

The desirability of exercising exceptional judicial management in complex proceedings has been recognized in

several federal and state cases and statutes.[2] Under 28 U.S.C.S. § 1915(d), the Court may request an attorney to represent a person in a civil proceeding when issues presented by the case are so complex that denial of counsel would be likely to result fundamental unfairness.[3] Further, in criminal cases, before a criminal defendant may represent himself at trial, the defendant must knowingly and intelligently waive his right to trial.[4] C. R.C. Rule 1800 encourages judges faced with a complex case to consider issuing case management order or similar remedy to supervise complex litigation. The designation of a case as "complex" is determined by factors listed in C.R.C Rule 1800 and Civil Case Cover Sheet 982.2 (b)(1), per C.R.C. Rule 1800.

The above rules recognize that self-representation is almost always unwise, particularly in criminal and complex civil cases where the opposing counsel is experienced professional counsel who has the advantage of skill, training and experience. In addition, such cases involve complex facts and questions of law, which are unfamiliar to self-represented parties. The result is that the self-represented parties may easily conduct his or her case in a manner to his or her own detriment.

The Petitioner is requesting that a lesser requirement be imposed on the ~~Trial Courts~~ to issue a warning to the litigant regarding the risks and disadvantages of self-representation in complex civil cases similar to the forewarning given to a criminal defendant. Without such a warning, the proper under CCP § 473 standard of review is the reasonable lay-person. Petitioner raised this issue on appeal, contending that the proper standard of review under CCP § 473 was a reasonable lay person as Petitioner is self-

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[2] See e.g. Carnley v. Carnley, 1962, 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed.2d 70; Barnhill v. Doiron, 958 F.2d 200, 202 (7th Circuit 1992); Hernandez v. The Superior Court of the State of California, 112 Cal. App. 285, 4 Cal. Rptr. 3d 883 (2003); Volkswagen of America, Inc., et. all. V. The Superior Court of the City and County of San Francisco, 94 Cal. App. 4h 695; 114 Cal. Rptr. 541 (2001).

[3] United States ex rel Wissenfeld v. Wilkins, 2 Cir. 1960, 281 F 2d 707

[4] Faretta v. California, 422 U.S. 806 835, 45 L. Ed. 2d 562, 95 S. Ct. 2525 (1975).

represented and lacks any legal training. Further, this case is complex in that it involves parties from several counties and multiple legal claims and requires exceptional judicial management. The question presented by this petition is important because it impacts the fundamental right of every citizen to a fair trail.

## VIII. STATUTORY AND CASE LAW BACKGROUND

Before a criminal defendant may represent himself at trial, he must knowingly and intelligently waive his right to counsel.[5] In order to competently and intelligently choose self-representation, "defendant should be made aware of the dangers and disadvantages of self representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open."[6] The test of a valid waiver of counsel is not whether specific warnings or advisements were given, but whether the record as a whole demonstrates that the defendant understood the disadvantages of self-representation, including the risks and complexities of a particular case.[7] Many district courts require judges to ask the defendant a series of questions drawn from the model inquiry set for the in the Bench Book for United States District Judges. After the questioning, the district court should make an express finding on the record that the accused has knowingly and voluntarily waived his right to counsel.[8] Thus, the burden is placed on the court to apprise the defendant of the dangers of self representation before a waiver of the right to counsel is effective.

While there is not right to counsel in civil matters, several statutes allow appointment of counsel in a civil matter. Title 28 U.S.C. § 1915(d) empowers the Court to appoint counsel in civil actions brought in forma pauperis. Appointment of counsel is

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[5] Faretta, 422 U.S. 806, (1975).
[6] Id. at 835.
[7] People v. Bloom 48 C.3d 1194, 1225, 259, C.R. 669, 774 P.2d 698 (1989).
[8] See e.g., United States v. McDowell, 814 F.2d 245, 250 (6th Cir. 1987).

discretionary and requires and evaluation of both the likelihood pf success on the merits and the ability of the plaintiff the articulate his claims pro se in light of the complexity of the legal issues involved. Counsel can also be appointed in other civil cases, such as cases brought pursuant to 28 U.S.C.S. § 2255. Again, the complexity of the case is one of the determining factors in whether counsel should be appointed. In such complex cases, the court has found that the denial of counsel would likely result in fundamental unfairness.[9]

Further, a civil case may be designated as "complex" as thus require judicial management. Under California Rules of Court §1800, defines a "complex case" as "an action that requires exceptional judicial management to avoid placing unnecessary burdens on the court or the litigants and to expedite the case, keep costs reasonable, and promote effective decision making by the court, the parties, and counsel." In determining whether the case is complex, the Court considers, among other things, whether the action is likely to involve:

1. Numerous pretrial motions raising difficult or novel legal issues that will be time-consuming to resolve;
2. Management of a large number of witnesses or a substantial amount of documentary evidence;
3. Management of a large number of separately represented parties;
4. Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court; or
5. Substantial post-judgment supervision

The Standard of Judicial Administration § 19 (superseded by the California Rules of Court) reflects the same concern for the manner in which complex case should be handled. Further, Government Code section 68607 provides that "in accordance with this article and consistent with statute, judges shall have the responsibility to… actively manage the processing of litigation."

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[9] Barnhill, 958 F.2d 200, 202 (7th Circuit 1992)

However, unlike criminal cases, there is not statute or case law to suggest to court is required to apprise the plaintiff of the dangers of self representation despite the complexity of the case.

## IX. ARGUMENT

### A. STATUTE AND CASE LAW SUPPORT THE PROPOSITION THAT THE COURT WARN LITIGANTS IN COMPLEX CIVIL TRIAL ABOUT THE DANGERS OF SELF-REPRESENTATION.

In criminal trials, a defendant is constitutionally entitled to counsel. If a defendant chooses to represent himself or herself, the Court must adequately warn of the dangers and disadvantages of self representation. The Court must affirmatively show that the record as a whole demonstrates that the defendant understood the disadvantages of self-representation, including the risks and complexities of a particular case. This requirement reflects the concern that self-representation is most often not the desirable option and can often lead the defendant to act in ways detrimental to his or her defense. In addition, the state is always represented by a skilled attorney who has the knowledge and expertise that the defendant likely lacks. This requirement also reflects the risk and losses that the defendant faces, which is often imprisonment and/or monetary fines.

As stated in Part VII, statute and case law gives the court discretion to appoint counsel in complex civil case where a denial of counsel would in effect reduce the proceeding to an ex parte proceeding.[10] Petitioner is asking that the less burdensome of the two rights given to criminal defendants be afforded to litigants in complex civil matters: that a warning be given before a litigant appears in pro per in a complex civil matter.

The designation of certain civil case as complex and thus requiring judicial management further illustrates the need for particular caution in such matters. In allowing such judicial management, the Court recognizes the dangers involved in

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[10] Dillon v United States, 307 F.2d 445, 453 (1962).

complex litigation even for experienced attorneys. In pro per litigants should at the very least be aware of how the Courts view such litigation and why self-representation carries inherent dangers.

B. POLICY SUPPORTS THE NECESSITY OF SUCH A WARNING.

1. Such a Warning Will Promote Judicial Efficiency.

It is well recognized that all courts have inherent supervisory and administrative powers which enable then to carry out their duties, and which exist apart from any statutory authority. Federal courts have long recognized that active and effective judicial management of litigation is critical. One federal court has explained that managerial power is not merely desirable, it is necessary. Judges are permitted, therefore, to bring management power to bear upon massive and complex litigation to prevent it from monopolizing the services of the court to the exclusion of other litigants.[11] As improvements in technology lead to increasingly complex litigation, the need for the supervision of the court has also increased. The courts are also concerned with overbroad litigation. The system cannot tolerate lawsuits by prospective plaintiffs who sue multiple defendants on speculation.[12]

A warning regarding the dangers of self representation will mitigate costs, expedite litigation, and promote effective decision-making by the court, the parties, and counsel. Such a warning allows litigants to consider whether the complexity of the case requires the guidance of counsel. In turn, such cases will require less judicial management because both parties are represented by counsel. This warning, unlike the appointment of counsel, cost only a few moments of time but saves the court's time and the litigants from potentially making costly mistakes.

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[11] First State Insurance v. The Superior Court of Los Angeles County, 79 Call. App. 4th 342, 94 Cal. Rptr. 2d. 104 (2000).

[12] Bockrath v. Aldrich Chem. Co., 21 Cal. 4th 71, 81, 86 Cal. Rptr. 2d 846, 980 P.2d 398 (1999).

2. Litigants in complex civil cases face similar dangers and risks as criminal defendants.

Litigants in complex civil cases often risk facing heavy fines and other financial burdens as result of the litigation. Thus, the reasoning behind the warnings given to criminal defendant applies to litigant in complex civil matters as well.

C. WITHOUT SUCH A WARNING, THE RIGHT TO A FAIR TRIAL AND EQUAL PROTECTION UNDER THE CONSTITUTION IS DENIED.

The court has recognized that in complex civil cases the court might need to appoint counsel. In such cases the court has further recognized that the denial of counsel could result in fundamental unfairness.[13] Although there is no right to counsel in civil cases, factual issues can be so complex in civil cases that the denial of counsel would reduce the hearings to an ex parte proceeding.[14] Petitioner does not contend that the court should have appointed a counsel in his case despite its complexity, but rather holds that the court should have apprised Petitioner of the disadvantages of self-representation in this complex matter at the outset of the trial. Such a warning would have put Petitioner on notice of the risks of proceeding in pro per. As a result, Petitioner made grave errors that impacted the outcome of his suit. Due to the complex nature of the suit both factually and procedurally, the lack of such a warning affected the Petitioner's right to a fair trial.

Further, the lack of such a warning requirement violates the Equal Protection Clause of the United States Constitution. Because prison inmates are provided a warning regarding the risks of self-representation and possibly appointed counsel in complex civil matter, it follows that all litigants are entitled to this warning as the risks are just as great.

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[13] See DesRosers, 949 F.2d 15, 24 (1st Cir, 1991); Barnill, 958 F.2d 200, 2002 (7th Cir 1992).

[14] Dillon, 307 F.2d 445 (1962).

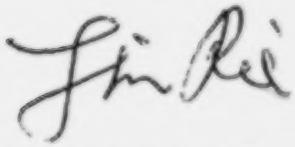
D. BECAUSE THE COURT FAILED TO GIVE SUCH A WARNING, THE PROPER STANDARD OF REVIEW UNDER CPP § 473 WAS A REASONABLE LAY-PERSON.

Once a warning regarding the risks of self representation is given, a litigant in a complex civil case is put on notice that he or she proceeds at his or her own risk. However, without such a warning the litigant, due to inexperience, is often unaware of the dangers of self-representation in complex cases. The requirement of such a warning is simply an extension of the need for judicial management in complex case already practiced by the court.

## X. CONCLUSION AND RELIEF SOUGHT

For the forgoing reasons, Petitioner respectfully requests this case be remanded to Trial Court to apply the proper standard of review of a reasonable lay-person under CCP § 473.

Respectfully submitted this 31st day of October 2005,



Jin Rie, Petitioner in Pro Per

# APPENDIX 1
# STATUTORY PROVISIONS

**California Code of Civil Procedure § 473: Amendment of pleadings**

(a) (1) The court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect; and may, upon like terms, enlarge the time for answer or demurrer. The court may likewise, in its discretion, after notice to the adverse party, allow, upon any terms as may be just, an amendment to any pleading or proceeding in other particulars; and may upon like terms allow an answer to be made after the time limited by this code.

(2) When it appears to the satisfaction of the court that the amendment renders it necessary, the court may postpone the trial, and may, when the postponement will by the amendment be rendered necessary, require, as a condition to the amendment, the payment to the adverse party of any costs as may be just.

(b) The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. Application for this relief shall be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken. However, in the case of a judgment, dismissal, order, or other proceeding determining the ownership or right to possession of real or personal property, without extending the six-month period, when a notice in writing is personally served within the State of California both upon the party against whom the judgment, dismissal, order, or other proceeding has been taken, and upon his or her attorney of record, if any, notifying that party and his or her attorney of record, if any, that the order, judgment, dismissal, or other proceeding was taken against him or her and that any rights the party has to apply for relief under the provisions of Section 473 of the Code of Civil Procedure shall expire 90 days after service of the notice, then the application shall be made within 90 days after service of the notice upon the defaulting party or his or her attorney of record, if any, whichever service shall be later. No affidavit or declaration of merits shall be required of the moving party. Notwithstanding any other requirements of this section, the court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any (1) resulting default entered by the clerk against his or her client,

and which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney' s mistake, inadvertence, surprise, or neglect. The court shall, whenever relief is granted based on an attorney's affidavit of fault, direct the attorney to pay reasonable compensatory legal fees and costs to opposing counsel or parties. However, this section shall not lengthen the time within which an action shall be brought to trial pursuant to Section 583.310.

(c) (1) Whenever the court grants relief from a default, default judgment, or dismissal based on any of the provisions of this section, the court may do any of the following:

(A) Impose a penalty of no greater than one thousand dollars ($ 1,000) upon an offending attorney or party.

(B) Direct that an offending attorney pay an amount no greater than one thousand dollars ($ 1,000) to the State Bar Client Security Fund.

(C) Grant other relief as is appropriate.

(2) However, where the court grants relief from a default or default judgment pursuant to this section based upon the affidavit of the defaulting party's attorney attesting to the attorney's mistake, inadvertence, surprise, or neglect, the relief shall not be made conditional upon the attorney's payment of compensatory legal fees or costs or monetary penalties imposed by the court or upon compliance with other sanctions ordered by the court.

(d) The court may, upon motion of the injured party, or its own motion, correct clerical mistakes in its judgment or orders as entered, so as to conform to the judgment or order directed, and may, on motion of either party after notice to the other party, set aside any void judgment or order.

**IV Witkin Cal. Crim. Law Crim Trial § 256: Admonitions to Defendant**
In order competently and intelligently to choose self-representation, "defendant should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.' " ( *Faretta v. California* (1975) 422 U.S. 806, 95 S.Ct. 2525, 2541, 45 L.Ed.2d 562, 582, supra, §248.)

In *People v. Lopez* (1977) 71 C.A.3d 568, 138 C.R. 36, the court *suggested* specific guidelines for trial judges to consider when a defendant asserts the right of self-representation:

(a) The defendant must be made aware of the dangers and disadvantages of self-representation. The admonition should include the following: (1) Self-representation is almost always unwise and defendant may conduct a defense to his or her own detriment; (2) defendant will have to abide by the same rules as lawyers and will get no help from the judge; (3) the prosecution will be represented by experienced professional counsel who will have the advantage of skill, training, and ability; and (4) defendant will have no special library privileges nor a staff of investigators at defendant's beck and call. (71 C.A.3d 573.)

(b) The trial court should make some inquiry into defendant's intellectual capacity. The range of this inquiry might include the following: (1) The court might examine the defendant's education and familiarity with legal procedures. (2) If there is any question about defendant's mental capacity, the trial court should consider referral for a psychiatric exam. (3) To determine that defendant's choice is an intelligent one, defendant must be fully aware of his or her right to counsel at no cost. (4) The trial judge should consider exploring the nature of the proceedings, and the possible outcome and punishment. (5) Defendant should know that the right of self-representation may be terminated for misbehavior or trial disruption. (71 C.A.3d 573, 574.)

(c) The defendant waives any claim that self-representation was inadequate or that defendant was denied the effective assistance of counsel. Thus, defendant should know that he or she "will be throwing away one of the criminal defendant's favorite contentions on appeal." (71 C.A.3d 574.)

However, the test of a valid waiver of counsel "is not whether specific warnings or advisements were given but whether the record as a whole demonstrates that the defendant understood the disadvantages of self-representation, including the risks and complexities of the particular case." ( *People v. Bloom* (1989) 48 C.3d 1194, 1225, 259 C.R. 669, 774 P.2d 698; see *People v. Cervantes* (1978) 87 C.A.3d 281, 287, 150 C.R. 819 [warning not adequate; record did not demonstrate knowing and intelligent election]; *People v. Fabricant* (1979) 91 C.A.3d 706, 713, 154 C.R. 340 [record did not reveal adequate warnings]; *People v. Torres* (1979) 96 C.A.3d 14, 22, 157 C.R. 560 [serious and complex offense required admonition of perils of self-representation; admonition could be memorialized at any place in the record]; *People v. Burdine* (1979) 99 C.A.3d 442, 447, 160 C.R. 375 [form petition to proceed in pro. per. sufficient to show knowing and intelligent election]; *People v. Barlow* (1980) 103 C.A.3d 351, 364, 163 C.R. 664 [criticizing *Fabricant; Faretta* does not require any particular warning]; *People v. Paradise* (1980) 108 C.A.3d 364, 366, 166 C.R. 484 [refusing to follow *Torres;* warning of risk of self-representation "need not appear of record so long as the record as a whole shows that the express waiver of counsel was

intelligent and with understanding"]; *Benge v. Superior Court* (1980) 110 C.A.3d 121, 129, 167 C.R. 714 [record need not show advice to defendant, only knowing and intelligent election]; *Zimmerman v. Municipal Court* (1980) 111 C.A.3d 174, 179, 168 C.R. 434 [*Lopez* does not require specific warning and record need not affirmatively show that defendant was advised of risks of self-representation]; *People v. Longwith* (1981) 125 C.A.3d 400, 407, 409, 178 C.R. 136 [*Lopez* criteria and standards not binding]; *People v. Spencer* (1984) 153 C.A.3d 931, 944, 945, 200 C.R. 693 [warning required when defendant personally presents case with attorney as cocounsel]; *People v. Mellor* (1984) 161 C.A.3d 32, 207 C.R. 383 [relevant question is whether trial judge made inquiry adequate to insure knowing and intelligent inquiry; *Lopez* criteria not binding]; *People v. Truman* (1992) 6 C.A.4th 1816, 1823, 9 C.R.2d 138 [claim that certain warnings were not given was insufficient to show that waiver was not knowing and intelligent]; *People v. Noriega* (1997) 59 C.A.4th 311, 315, 69 C.R.2d 127 [merely asking defendant if he knew of constitutional right to counsel and voluntarily waived it was inadequate].)

A warning that a self-represented defendant is precluded from asserting ineffective assistance of counsel as grounds for relief on appeal is not constitutionally required. ( *People v. Bloom* (1989) 48 C.3d 1194, 1225, 259 C.R. 669, 774 P.2d 698.)

**Title 28 U.S.C. § 1915 (2005) Proceedings in forma pauperis**

(a) (1) Subject to subsection (b), any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such [person] prisoner possesses that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress.

(2) A prisoner seeking to bring a civil action or appeal a judgment in a civil action or proceeding without prepayment of fees or security therefor, in addition to filing the affidavit filed under paragraph (1), shall submit a certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing of the complaint or notice of appeal, obtained from the appropriate official of each prison at which the prisoner is or was confined.

(3) An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

(b) (1) Notwithstanding subsection (a), if a prisoner brings a civil action or files an appeal in forma pauperis, the prisoner shall be required to pay the full amount of a filing fee. The court shall assess and, when funds exist, collect, as a partial payment of any court fees required by law, an initial partial filing fee of 20 percent of the greater of--

(A) the average monthly deposits to the prisoner's account; or

(B) the average monthly balance in the prisoner's account for the 6-month period immediately preceding the filing of the complaint or notice of appeal.

(2) After payment of the initial partial filing fee, the prisoner shall be required to make monthly payments of 20 percent of the preceding month's income credited to the prisoner's account. The agency having custody of the prisoner shall forward payments from the prisoner's account to the clerk of the court each time the amount in the account exceeds $ 10 until the filing fees are paid.

(3) In no event shall the filing fee collected exceed the amount of fees permitted by statute for the commencement of a civil action or an appeal of a civil action or criminal judgment.

(4) In no event shall a prisoner be prohibited from bringing a civil action or appealing a civil or criminal judgment for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee.

(c) Upon the filing of an affidavit in accordance with subsections (a) and (b) and the prepayment of any partial filing fee as may be required under subsection (b), the court may direct payment by the United States of the expenses of (1) printing the record on appeal in any civil or criminal case, if such printing is required by the appellate court; (2) preparing a transcript of proceedings before a United States magistrate [United States magistrate judge] in any civil or criminal case, if such transcript is required by the district court, in the case of proceedings conducted under section 636(b) of this title [28 USCS § 636(b)] or under section 3401(b) of title 18, United States Code; and (3) printing the record on appeal if such printing is required by the appellate court, in the case of proceedings conducted pursuant to section 636(c) of this title [28 USCS § 636(c)]. Such expenses shall be paid when authorized by the Director of the Administrative Office of the United States Courts.

(d) The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases.

(e) (1) The court may request an attorney to represent any person unable to afford counsel.

(2) Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that--

(A) the allegation of poverty is untrue; or

(B) the action or appeal--

(i) is frivolous or malicious;

(ii) fails to state a claim on which relief may be granted; or

(iii) seeks monetary relief against a defendant who is immune from such relief.

(f) (1) Judgment may be rendered for costs at the conclusion of the suit or action as in other proceedings, but the United States shall not be liable for any of the costs thus incurred. If the United States has paid the cost of a stenographic transcript or printed record for the prevailing party, the same shall be taxed in favor of the United States.

(2) (A) If the judgment against a prisoner includes the payment of costs under this subsection, the prisoner shall be required to pay the full amount of the costs ordered.

(B) The prisoner shall be required to make payments for costs under this subsection in the same manner as is provided for filing fees under subsection (a)(2).

(C) In no event shall the costs collected exceed the amount of the costs ordered by the court.

(g) In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

(h) As used in this section, the term "prisoner" means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.

**28 U.S.C.S. § 2255: Federal custody; remedies on motion attacking sentence**

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or

otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

An appeal may be taken to the court of appeals from the order entered on the motion as from the final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of--

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Except as provided in section 408 of the Controlled Substances Act [21 USCS § 848], in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

A second or successive motion must be certified as provided in section 2244 [28 USCS § 2244] by a panel of the appropriate court of appeals to contain--

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of

the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

**California Rules of Court §1800: Definition**

(a). [Definition]

A "complex case" is an action that requires exceptional judicial management to avoid placing unnecessary burdens on the court or the litigants and to expedite the case, keep costs reasonable, and promote effective decision making by the court, the parties, and counsel.

(b). [Factors]

In deciding whether an action is a complex case under subdivision (a), the court shall consider, among other things, whether the action is likely to involve:

(1) Numerous pretrial motions raising difficult or novel legal issues that will be time-consuming to resolve;

(2) Management of a large number of witnesses or a substantial amount of documentary evidence;

(3) Management of a large number of separately represented parties;

(4) Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court; or

(5) Substantial postjudgment judicial supervision.

(c). [Provisional designation]

Except as provided in subdivision (d), an action is provisionally a complex case if it involves one or more of the following types of claims:

(1) Antitrust or trade regulation claims;

(2) Construction defect claims involving many parties or structures;

(3) Securities claims or investment losses involving many parties;

(4) Environmental or toxic tort claims involving many parties;

(5) Claims involving mass torts;

(6) Claims involving class actions; or

(7) Insurance coverage claims arising out of any of the claims listed in subdivisions (c)(1) through (c)(6).

(d). [Court's discretion]

Notwithstanding subdivision (c), an action is not provisionally complex if the court has significant experience in resolving like claims involving similar facts

and the management of those claims has become routine. A court may declare by local rule that certain types of cases are or are not provisionally complex pursuant to this subdivision.

**California Government Code section 68607: Responsibilities and duties of judges**

In accordance with this article and consistent with statute, judges shall have the responsibility to eliminate delay in the progress and ultimate resolution of litigation, to assume and maintain control over the pace of litigation, to actively manage the processing of litigation from commencement to disposition, and to compel attorneys and litigants to prepare and resolve all litigation without delay, from the filing of the first document invoking court jurisdiction to final disposition of the action.

The judges of the program shall, consistent with the policies of this article:

(a) Actively monitor, supervise and control the movement of all cases assigned to the program from the time of filing of the first document invoking court jurisdiction through final disposition.

(b) Seek to meet the standards for timely disposition adopted pursuant to Section 68603.

(c) Establish procedures for early identification of cases within the program which may be protracted and for giving those cases special administrative and judicial attention as appropriate, including special assignment.

(d) Establish procedures for early identification and timely and appropriate handling of cases within the program which may be amenable to settlement or other alternative disposition techniques.

(e) Adopt a trial setting policy which, to the maximum extent possible, schedules a trial date within the time standards adopted pursuant to Section 68603 and which schedules a sufficient number of cases to ensure efficient use of judicial time while minimizing resetting caused by overscheduling.

(f) Commence trials on the date scheduled.

(g) Adopt and utilize a firm, consistent policy against continuances, to the maximum extent possible and reasonable, in all stages of the litigation.

APPENDIX 2

DECISION OF THE CALIFORNIA SUPREME COURT
Jin Rie, Plaintiff and Appellant v. Bank of America, et al,
Defendants and Respondents
Case No. S131586

Court of Appeal, Second Appellate District, Division Four - No. B169668
S131586

# IN THE SUPREME COURT OF CALIFORNIA

**En Banc**

JIN RIE, Plaintiff and Appellant,

v.

BANK OF AMERICA N.A. et al., Defendants and Respondents.

Petition for review DENIED.

SUPREME COURT
FILED
MAR 30 2005
Frederick K. Ohlrich Clerk
DEPUTY

Chin, J., was recused and did not participate.

GEORGE
Chief Justice

APPENDIX 3

OPINION OF THE COURT OF APPEAL THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION FOUR

Jin Rie, Plaintiff and Appellant v. Bank of America, el al, Defendants and Respondents

Case No.: B169668

**JIN RIE, Plaintiff and Appellant, v. BANK OF AMERICA, N.A., et al., Defendants and Respondents.**

**B169668**

**COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION FOUR**

***2005 Cal. App. Unpub. LEXIS 218***

**January 10, 2005, File**

**PRIOR HISTORY:** APPEAL from an order of the Superior Court of Los Angeles County, No. BC287880. Gregory W. Alarcon, Judge.

**DISPOSITION:** Dismissed in part, affirmed in part.

**CORE TERMS:** demurrer, cause of action, causes of action, abuse of process, line of credit, order sustaining, lawsuit, merchant, restore, order of dismissal, prospective economic advantage, litigation privilege, breach of contract, notice of appeal, summary judgment, oral agreement, inducement, demurred, conspiracy to commit, civil procedure, collection, contractual, financially, sustaining, interfere, pertains, speedy, amend, venue, ulterior motive

**COUNSEL:** Jin Rie, in pro. per., for Plaintiff and Appellant.

Barton, Klugman & Oetting and Tod V. Beebe for Defendant and Respondent Bank of America.

Rosen and Loeb and Alan L. Rosen for Defendants and Respondents Rosen and Loeb and Alan L. Rosen.

Hemar, Rousso & Heald and Robert V. McKendrick for Defendants and Respondents Law Offices of Hemar, Rousso & Heald and Robert McKendrick.

**JUDGES:** CURRY, J.; EPSTEIN, P. J., HASTINGS, J. Concurred.

**OPINIONBY:** CURRY

**OPINION:**

This appeal, one of three being litigated by appellant Jin Rie, arose after the trial court sustained defense demurrers to the claims in Rie's first amended complaint (FAC)--some with leave to amend and some without. As a result of the court's order, four of the five parties named as defendants were no longer in the case. n1 Appeal was taken with regard to the claims against those four parties. Subsequently, after further proceedings and after notice of appeal was filed by Rie, the final party named in the FAC, the Bank of America (the Bank), obtained a dismissal. Representing himself in pro. per. and unmindful of proper procedure, Rie's brief on appeal discussed his claims against the Bank. The Bank filed a respondent's brief. Because there was no appealable order dismissing the Bank at the time the notice of appeal was filed, and no way to construe the order sustaining the Bank's demurrer with leave to amend as a dismissal, we dismiss the appeal as it pertains to the Bank. As to the remaining parties, we affirm the trial court's decision.

> n1 These four parties are respondents Alan Rosen and Robert McKendrick and their respective law firms, Rosen and Loeb (R&L) and Hemar, Rousso & Heald (HR&H). They are referred to collectively herein as the attorney respondents.

**FACTUAL AND PROCEDURAL BACKGROUND**

The parties are in agreement that this dispute arises out of a line of credit and another account, referred to as a "merchant account," Rie had at one of the branches of the Bank. There is also no dispute that prior to the initiation of the underlying action, the Bank had sued Rie to recover amounts due under the line of credit in Bank of America v. Rie, case no. GC028902 (the Bank's Collection Action). According to the papers and pleadings in that matter, the Bank was represented by respondents Robert McKendrick and HR&H, although Rie contends that the Bank was also represented by respondents Rosen and R&L. n2 The Bank's Collection Action resulted in summary judgment in favor of the Bank in the amount of approximately $ 30,000, and was the subject of an earlier appeal, B165393, that was dismissed as the result of settlement.

n2 Rosen and R&L were the attorneys for the parties who foreclosed on property owned by Rie, and were named defendants in another lawsuit initiated by him. That lawsuit led to a judgment in favor of defendants and is also on appeal to this Court.

*Rie's Original Complaint*

Our record does not contain the original complaint, but other papers and pleadings indicate that, in addition to the Bank, Attorneys McKendrick and Alan Rosen and their respective firms, HR&H and R&L, were named defendants. Demurrers were submitted by defendants. n3 Apparently, the demurrers were sustained--the record does not contain the court's final ruling but it is alluded to in a later order--and the FAC was filed May 5, 2003. n4

n3 According to one demurrer, the original complaint contained such fanciful causes of action as "wrongful closure of bank account," "wrongful non-restoration of bank accounts," and "improper treatment of consumer."

n4 Rie attaches to his opening brief a document that appears to be the tentative order on the Bank's demurrer to the original complaint, dated March 2003. He complains that the trial court's ruling at that time was "inconsistent" with and "logically contradictory" to the ruling on the demurrers to the FAC currently on appeal. Although the earlier

order is not before us, we note that there is nothing obviously inconsistent or contradictory between the March 2003 order and the order under consideration in this appeal.

*Rie's FAC*

According to the FAC, Rie opened the line of credit and merchant account with the Bank in September 1994. The line of credit was in the amount of $ 25,000, and later increased to $ 35,000. By February 2000, Rie had used "a little less than $ 35,000" in order to cope with the foreclosure that is the subject of other lawsuits. In August or September 2001, the Bank began to withdraw $ 800 per month from Rie's business account as payments on the line of credit, and Rie quickly closed that account. Sometime earlier, beginning in about June 2001, agents or employees for R&L had demanded, on behalf of the Bank, that the entire debt be repaid "contrary to [Rie's] previous arrangement with [the Bank]." On October 26, 2001, Rie "talked over the phone with several persons including Nicole, an employee of [the Bank], about the matter of this case, and Nicole agreed orally to restore the line of credit account." The Bank, however, "would not restore the line of credit and as such subverted the oral agreement." In addition, at some point in early 2001, the Bank returned payments Rie attempted to deposit in the merchant account, "alleging that [Rie] closed the [merchant] account because of charge-backs" when, in fact, the Bank "closed that account arbitrarily without warning and discussion and without following proper procedure," and refused to reinstate it.

With respect to the attorney respondents, Rie was "informed and believes" that Rosen and R&L "influenced the subversion [of the alleged oral agreement to restore the line of credit] out of malice toward [Rie] because [Rie] had previously initiated a lawsuit against Rosen" and that Rosen and R&L have "ulterior motives . . . to prevent/interrupt/undermine the lawsuit by [Rie] against them by financial pressure or deprive [Rie] of his funds for the lawsuit, and to harass [Rie] financially out of malice due to a previous lawsuit." McKendrick and HR&H were accused of

"conspiring with Defendants Rosen and R&L" and failing to serve a motion for summary judgment on Rie in the case in which the Bank sued Rie.

The FAC accused the Bank of breach of implied covenant of good faith and fair dealing "by closing [Rie's] line of credit account and merchant account" in the first cause of action and breach of oral contract in the second cause of action for breach of the alleged October 26, 2001, oral agreement to restore the line of credit. The third cause of action, for inducement of breach of contract, was addressed to Rosen and R&L, claiming they were involved in the loss of his line of credit and merchant account with the Bank by foreclosing on a piece of property owned by Rie. Rie brought suit against Rosen and R&L in June 2002, and they "induced [the Bank] not to restore the line of credit account . . . in order to interrupt and interfere with [Rie's] other litigation against [them]."

The fourth cause of action for abuse of process was alleged against all respondents and was based on respondents having "improper motives and interests against [Rie] since 2000 until now." The cause of action appears to be based on the Bank's Collection Action, since reference is made to "hard and oppressive collection activities against Rie by [Rosen and R&L] as the retained law offices of [the Bank]" and "the motive to get speedy and easy success in the case of [the bank] with less cost." The attorney respondents were charged with advising the Bank "not to restore the line of credit account, to file a complaint, not to try to settle in a reasonable way, to speed up the procedure maximally, to attempt speedy default judgments, to collect more hard and more oppressively, to make the other party spend more attorney fees and legal costs."

The fifth cause of action for conspiracy to commit abuse of process was alleged against Rosen, R&L, McKendrick, and HR&H, as was the sixth cause of action for interference with economic relations. The interference was again based on information and belief that the attorney respondents "improperly [sought] to defame [Rie] and to subvert [the Bank's] policies and

institute collection against [Rie] to convince [the Bank] to abandon [Rie's] line of credit." The FAC also accused Rosen and R&L, on information and belief, of making false statements and furnishing "false information" to the Bank. The seventh cause of action for interference with prospective economic advantage, echoed the sixth, claiming that Rosen and R&L "discouraged [the Bank] not to maintain the line of credit and their agreement with [Rie] because [Rosen and R&L] wanted to interrupt and interfere with the litigation against Rosen, et al."

The eighth and ninth causes of action for "violation of civil procedure" and fraud claimed that McKendrick and HR&H selected the wrong venue in the Bank's Collection Action, and that Rie was served with the motion for summary judgment at the wrong address.

*Respondents' Demurrers and Court's August 1, 2003, Order*

Respondents demurred to all causes of action in which they were named in three separate demurrers. By order dated August 1, 2003, the trial court sustained the demurrers, without leave to amend for the most part, leaving only two potentially viable claims against the Bank.

Specifically, Rosen and R&L demurred to the third cause of action for inducement of breach of contract, the fourth cause of action for abuse of process, the fifth cause of action for conspiracy to commit abuse of process, the sixth cause of action for interference with economic relations, and the seventh cause of action for interference with prospective economic advantage. The court sustained this demurrer without leave to amend. As to the interference and inducement claims, the court stated that the FAC indicated that "Rosen and R&L were acting at all relevant times as [the Bank's] agents and within the scope of such agency, and . . . an agent acting within the course and scope of his agency cannot be liable for interfering with his principal's contracts or contractual relations with third parties, or with economic advantage third parties hope to derive by means of their contractual/economic relations." With respect to the abuse of

process and conspiracy claims, the court stated that the FAC "failed to allege facts that there was any abuse of process and thus both claims fail for lack of an essential element."

McKendrick and HR&H likewise demurred to the fourth cause of action for abuse of process, the fifth cause of action for conspiracy to commit abuse of process, the sixth cause of action for interference with economic relations, and the seventh cause of action for interference with prospective economic advantage, and also to the eighth and ninth causes of action for "violation of civil procedure" and fraud in which they were the only named defendants. The court sustained their demurrer, without leave to amend, as to the fourth through seventh causes of action "for the same reasons and on the same grounds as stated [in connection with the demurrer of Rosen and R&L]." As to the eighth and ninth causes of action, the court stated: "These claims are barred on their face by the litigation privilege for the same reasons as stated in the Court's ruling on Union Bank's demurrer to these claims as alleged in [Rie's] original complaint." n5

> n5 As we have said, the original complaint and order sustaining the demurrer(s) are not in our record.

Finally, the Bank demurred to the first cause of action for breach of implied covenant, the second cause of action for breach of oral agreement, and the fourth cause of action for abuse of process--the only causes of action in which it was named. The court rejected the defense of another action pending, describing it as a "disfavored" plea in abatement, and reproved the Bank for failing "to properly request judicial notice of the pleadings in the other action." The Bank also demurred to the first cause of action for failure to state facts indicating the existence of a contractual right; to the second cause of action for failure to indicate that the person Rie allegedly spoke to had the authority to bind the Bank or that he provided any consideration; and to the fourth cause of action on the ground of failure to plead any fact indicating that the Bank misused any process.

The court found merit to the Bank's contentions, noting that Rie failed to sufficiently allege "the terms of the underlying express agreement and his contractual rights thereunder to indicate that any of the alleged conduct by [the Bank] somehow deprived [Rie] of the benefit of those contractual rights"; "(a) facts indicating that the [Bank] employee who allegedly entered into an oral agreement with [Rie] had any authority to enter into such agreements on [the Bank's] behalf; or ([b]) facts indicating that [Rie] provided any consideration for the alleged agreement to restore [the Bank's] line of credit"; or "that [the Bank] misused any process in the underlying action, as opposed to using such process in the manner it was intended to be used but more aggressively than [Rie] thought appropriate."

The court sustained the demurrer without leave to amend as to the abuse of process claim, and granted Rie permission to amend the first and second causes of action for breach of contract.

*Rie's Appeal*

Rie appealed from the court's order on August 13, 2003. The notice stated that he intended to appeal the court's ruling on the third and fifth through ninth causes of action. For the fourth cause of action, Rie "appealed from Ruling . . . against [attorney respondents] entirely. If he is allowed to claim against [attorney respondents] in this cause of action, he will give up that cause of action against [the Bank] voluntarily." The notice further stated: "For the 1st and 2nd causes of action, [Rie] does not appeal wholly but he just wants to amend them after getting another opinion in other causes of action and against other Defendants from the court of appeal. In other words, in these 2 causes of action, at this time [Rie] does not appeal from Ruling as far as [the Bank] does not cross-appeal."

*Post-Appeal Dismissal of Action Against Bank*

The court's August 1, 2003, order gave Rie 20 days (until August 21, 2003) to amend his complaint. Rie did not file an amended complaint. On October 7, 2003, the court dismissed the action against the Bank based on its sustaining of the Bank's

demurrer to the FAC, and Rie's failure to file a second amended complaint.

In September 2004, Rie sought relief from the dismissal under *Code of Civil Procedure section 473*, claiming that he had been misled by opposing counsel as to the nature of the hearing on October 7. Rie stated in his moving papers before the trial court that he "was under the impression that the appellate case created a stay as to the trial court proceedings." He gave the same excuse for his failure to move for section 473 relief sooner.

## DISCUSSION

### *I*

*The Bank*

It is a well established principle that no appeal may properly be taken from an order resolving a demurrer, whether the demurrer is sustained or overruled. (*Coast Plaza Doctors Hospital v. UHP Healthcare (2002) 105 Cal.App.4th 693, 699; Hill v. City of Long Beach (1995) 33 Cal.App.4th 1684, 1695;* Eisenberg, Civil Writs and Appeals, P 2:237.) "Instead, the right to appeal generally lies from the judgment after trial (when demurrer overruled or granted with leave to amend) or from the judgment or order of dismissal (when demurer sustained without leave to amend)." (Eisenberg, *supra.*)

In some cases, appellate courts have saved an appeal where a demurrer is sustained as to all causes of action without leave to amend by treating the demurrer order as an order of dismissal or a judgment in the interest of judicial economy. (See, e.g., *Coast Plaza Doctors Hospital v. UHP Healthcare, supra, 105 Cal.App.4th 693, 699; Smith v. Hopland Band of Pomo Indians (2002) 95 Cal.App.4th 1, 3, fn. 1.)* In others, they have refused. (See, e.g., *Hill v. City of Long Beach, supra, 33 Cal.App.4th at pp. 1695-1696* [court "recognized it was within [its] discretion to save [the] cross-appeal by modifying the trial court's judgment to reflect dismissal of [the] non-contract causes of action and of the

individual defendants" but refused to do so, citing cases that supported a trend "to be less indulgent of parties who fail to perfect their rights of appeal"].)

Rie's lawsuit as it pertains to the Bank does not present a situation where this Court can save the appeal by treating the order sustaining the demurrer as a dismissal or judgment. The Bank's demurrer to the FAC was sustained without leave to amend as to only one of the three claims against it; the Bank's demurrer to the claims for breach of covenant and breach of oral contract was sustained *with* leave to amend. Accordingly, we cannot deem the August 1, 2003, order to be an order of dismissal or judgment as to the Bank because, at that point, there were still claims pending against the Bank, albeit in a defective form. The law is clear that a judgment or dismissal cannot issue where the court has not disposed of all causes of action against a party (*Mounger v. Gates (1987) 193 Cal. App. 3d 1248, 1254, 239 Cal. Rptr. 18),* and that an order granting a demurrer with leave to amend does not dispose of a cause of action (*U.S. Financial v. Sullivan (1974) 37 Cal. App. 3d 5, 11, 112 Cal. Rptr. 18).* n6

> n6 In *Mounger*, the court treated the appeal from an order sustaining a demurrer without leave to amend as to some causes of action as a writ "because it presented a question of public importance." *(193 Cal. App. 3d at p. 1254.)* No such issues are presented here. In *U.S. Financial*, the court treated the improper appeal as a writ because it was "unthinkable to permit [the] complex case [before the court] to go to trial on only some of the counts because of an erroneous ruling by the trial court on defendants' demurrers when to do so would almost certainly result in an eventual appeal and reversal of the judgment because of this error." *(37 Cal. App. 3d at p. 12.)* There were no obvious errors in the trial court's ruling here.

The Bank apparently expects us to treat this matter as if it were an appeal from an order sustaining a demurrer *without* leave to amend because, although Rie was granted leave to amend his first two causes of action, he chose not to do so. As a result of his inaction, a dismissal as to the Bank was entered in October 2003, several months after the notice of appeal was filed. The problem

with that approach is twofold. First, the record on appeal is not adequate to fairly resolve whether the dismissal was properly entered. Rie provided a copy of the court's October 2003 order of dismissal in a request to supplement the clerk's transcript, but we have none of the papers filed by the Bank in support of the motion to dismiss or Rie's in opposition. Second, Rie stated in his notice of appeal that he was appealing the August 1, 2003, order only in part, expressly not including the portion sustaining the demurrer to the first two causes of action. Where a party limits its appeal, we are without authority to liberally construe the notice and lack jurisdiction to review the portion of the judgment not appealed. (*Unilogic, Inc. v. Burroughs Corp. (1992) 10 Cal.App.4th 612, 625; Norman I. Krug Real Estate Investments, Inc. v. Praszker (1990) 220 Cal. App. 3d 35, 47, 269 Cal. Rptr. 228.)*

Although we are desirous of promoting judicial economy, an attempt to discuss issues pertinent to a nonappealable order sustaining a demurrer with leave to amend is not a minor or technical error, particularly where the notice of appeal explicitly excluded that aspect of the trial court's ruling and the pertinent documents do not appear in the record. We have no option but to dismiss the appeal as to the Bank.

*II*

*Attorney Respondents*

As we have said, an appeal should not be taken from an order sustaining a demurrer. But because the order sustaining the demurrers of the attorney respondents was without leave to amend, and eliminated them as parties in the case, we may properly deem the order to be an order of dismissal under established authority. (E.g., *Coast Plaza Doctors Hospital v. UHP Healthcare, supra, 105 Cal.App.4th 693, 699.)* Therefore, we will consider the appeal on the merits as it pertains to the attorney respondents.

*A*

Abuse of Process

Rosen and R&L were named in the third cause of action for inducement of breach of contract, the fourth cause of action for abuse of process, the fifth cause of action for conspiracy to commit abuse of process, the sixth cause of action for interference with economic relations, and the seventh cause of action for interference with prospective economic advantage. McKendrick and HR&H were likewise named in the fourth, fifth, sixth, and seventh causes, and also were the sole named defendants in the eighth and ninth causes of action for "violation of civil procedure" and fraud.

The tort of abuse of process n7 consists of "misuse of the process [of the courts] in an action that may itself be entirely proper; and misuse means use for a purpose other than that for which the process is designed." (*5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 715*, p. 173.) "The plaintiff in an action for abuse of process must allege (1) the ulterior motive or purpose of the defendant in using the process and (2) the wrongful act, i.e., use of the process in an improper manner." (*Id.*, § 716, p. 174.) Simply alleging an ulterior motive is not enough. (*Ibid.*)

> n7 It is not entirely clear that Rie is seeking to revive his claim for abuse of process, particularly as to Rosen and R&L. But we include this discussion to confirm the correctness of the trial court's decision nonetheless.

This is illustrated by the case of *Pimentel v. Houk (1951) 101 Cal. App. 2d 884*. There, plaintiff alleged that defendant "interfered with the conduct of defendant's farming business by wilfully, deliberately and maliciously filing his action against defendant"; that plaintiff attached defendant's tractors knowing that the tractors "were essential to defendant's farming business"; that plaintiff "knew that certain creditors of defendant held chattel mortgages upon some of defendant's equipment, and that he . . . personally urged creditors to repossess the mortgaged equipment"; and that plaintiff did this "not for the purpose of

collecting the alleged debt sued upon . . . but for the sole, single and express purpose of financially destroying defendant." (*Id. at pp. 885, 884.)* The court held that the allegations were deficient. Even if "the allegation that plaintiff caused the attachment to issue without any purpose of collecting the debt but solely for the purpose of destroying defendant financially," the court stated, "defendant failed to allege use of the process for a purpose not proper in the regular conduct of the proceeding." (*Id. at p. 886.)* For example, "it [was] not alleged that said attachment covered property exempt from execution, that it covered an excessive amount of defendant's property, that the debt alleged to be owed by defendant was otherwise secured, or that defendant requested that the levy be made upon other property." (*Ibid.*) Put simply, "plaintiff was fully within his rights in causing the writ of attachment to be issued and served; and the fact that he may have had an ulterior motive to destroy defendant financially did not render the use of the writ one improper in the regular conduct of the proceeding." (*Ibid.*)

Like the plaintiff in *Pimentel*, Rie alleged that the attorney respondents pursued the Bank's collection case for an ulterior or improper motive. But nowhere in either the FAC or his brief on appeal does he identify their use of process in an improper fashion. Attempting to get "speedy and easy success in the [Bank's case] with less cost" is a proper litigation tactic, and there is nothing impermissible about "not . . . trying to settle in a reasonable way, . . . speeding up the procedure maximally, . . . attempting speedy default judgments, . . . collecting more hard and more oppressively, [and]. . . making the other party spend more attorney fees and legal costs." As these allegations represented Rie's second attempt to allege a viable claim, the trial court was under no obligation to give him further opportunities to amend when the prospect of his alleging a viable claim for abuse of process seemed hopeless.

*B*

Interference Claims

The various interference claims are all based on Rie's loss of the line of credit with the Bank and the closure of his merchant account. The trial court pointed to paragraph 8 of the FAC which contained the generic allegation that all defendants were acting as the agents and/or employees of the others, and ruled that an agent acting within the course and scope of his agency cannot be liable for interfering with his principal's economic relations with third parties. (See *Filippo Industries, Inc. v. Sun Ins. Co. (1999) 74 Cal. App. 4th 1429, 1443,* quoting *Gruenberg v. Aetna Ins. Co. (1973) 9 Cal.3d 566, 576, 108 Cal. Rptr. 480* [discussing principle that "'ordinarily corporate agents and employees acting for and on behalf of the corporation cannot be held liable for inducing a breach of the corporation's contract since being in a confidential relationship to the corporation their action in this respect is privileged'"].)

In his brief, Rie contends that the FAC "clearly alleged that the conduct of the defendants took place before they were agents of [the Bank]," citing to paragraph 86 of the FAC. n8 Paragraph 86 of the complaint says nothing about the dates of any conduct. Rie may have intended to refer to paragraph 85, which states on "information and belief" that "from about June until October, 2001," Rosen and R&L "intentionally and deliberately interfered with" Rie's economic relations with the Bank by "contacting [Rie] and sending letters claiming that [Rie] should repay its existing line of credit in full to [the Bank], in violation of the agreement which [Rie] had with [the Bank]." Rie, "suspicious of the intentions and motivation of [Rosen and R&L], sent correspondence . . . seeking information confirming the relationship between them and [the Bank]" and Rosen and R&L "were not able to satisfy [Rie] that their purposes were legitimate."

n8 This argument appears to be directed only toward Rosen and R&L.

The allegations identified by Rie do not negate the agency allegation. If Rosen and R&L were sending letters to Rie asking for payment on the line of credit, the natural inference is that they were acting as the Bank's agent. Moreover, in his brief, Rie continues to assert that Rosen and R&L were retained by the Bank to assist in the Bank's Collection Action. "On appeal from a judgment of dismissal following the sustaining of a demurrer without leave to amend, the reviewing court must accept as true not only those facts alleged in the complaint but also facts that may be implied or inferred from those expressly alleged." (*Marshall v. Gibson, Dunn & Crutcher (1995) 37 Cal.App.4th 1397, 1403.)* We have no choice but to assume the facts alleged in the FAC were true and correct, and that Rosen and R&L were acting as the Bank's agent when they allegedly contacted Rie. n9

> n9 We note that this contact *with Rie* is the only specific action allegedly taken by Rosen and R&L to interfere with the relationship with the Bank. A defendant does not interfere with a contract or economic relationship between a third party and the plaintiff by contacting the plaintiff. The trial court would have been justified in granting the demurrer with or without the agency allegation.

With respect to McKendrick and HL&H, Rie's argument seems to be that his relationship with the Bank was disrupted and somehow, someone must be responsible--either the principal or the agent. That is incorrect. No tort occurs when a party to a business relationship decides to discontinue the relationship after discussions with its employees and agents. (*Filippo Industries, Inc. v. Sun Ins. Co., supra, 74 Cal.App.4th 1429, 1443.)*

*C*

Fraud in Collection Action

Demurrer to the eight and ninth causes of action--in which Rie alleged that McKendrick and HR&H violated civil procedure and committed fraud by selecting an improper venue and falsely declaring they had served Rie with a summary judgment motion in the collection litigation--was sustained based on the litigation

privilege. n10 The litigation privilege "protects a 'publication or broadcast . . . [P] . . . [P] (b) in *any* . . . (2) judicial proceeding . . . .'" (*Pollock v. University of Southern California (2003) 112 Cal.App.4th 1416, 1429-1430.)* Filing a defamatory document is protected by the privilege. (*Ibid.*) In addition, "because the policy goal of encouraging free access to the courts by discouraging derivative litigation is paramount, California courts have extended the litigation privilege beyond the defamation context to preclude numerous other tort actions. For example, abuse of process, fraud, intentional inducement of breach of contract, intentional infliction of emotional distress, intentional interference with prospective economic advantage, invasion of privacy, negligence, and negligent misrepresentation are all subject to the privilege." (*Brown v. Kennard (2001) 94 Cal.App.4th 40, 45.)*

> n10 Rie contends in his brief that the litigation privilege was applied to the third, fifth, sixth, and seventh causes of action as well. We do not read the trial court's order that way. But to the extent Rie's claims of abuse of process and interference with its relationship with the Bank are based on actions taken in litigation, they would be barred for the reasons discussed in the text.

As explained by our Supreme Court: "In immunizing participants from liability for torts arising from communications made during judicial proceedings, the law places upon litigants the burden of exposing during trial the bias of witnesses and the falsity of evidence, thereby enhancing the finality of judgments and avoiding an unending roundelay of litigation, an evil far worse than an occasional unfair result. . . . [P] For our justice system to function, it is necessary that litigants assume responsibility for the complete litigation of their cause during the proceedings. To allow a litigant to attack the integrity of evidence after the proceedings have concluded, except in the most narrowly circumscribed situations, such as extrinsic fraud, would impermissibly burden, if not inundate, our justice system." (*Silberg v. Anderson (1990) 50 Cal.3d 205, 214, 266 Cal. Rptr. 638.)*

Rie had his opportunity to contest the venue and grant of summary judgment in the Bank's Collection Action through his appeal. n11 The law does not permit him to settle that case and bring up issues that relate to procedural defects in that case in a new litigation.

> n11 We would note that the record in the Bank's Collection Action indicates that Rie did contest venue and sought to vacate the summary judgment order on the ground that the motion had not been properly served. The trial court ruled against him.

## DISPOSITION

The appeal as it pertains to the Bank is dismissed for lack of an appealable order. The order sustaining the attorney respondents' demurrers without leave to amend is deemed an order of dismissal, and is affirmed. The attorney respondents are awarded their costs on appeal.

CURRY, J.

We concur:

EPSTEIN, P. J.

HASTINGS, J.